IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-288

LEWIS MILLER SMYTH, III,

Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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The Petitioner, LEWIS MILLER SMYTH, III, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on the 18th day of May, 1977. Petitioner's motion for rehearing and for rehearing en banc was denied on July 20, 1977.

OPINION BELOW

The opinion of the court of appeals (App. A, pp. A-1 - A-12 infra) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. A, pp. A-1 - A-12 infra) was entered on May 18, 1977.

The jurisdiction of this Court is involved under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Did the Fifth Circuit error in affirming the district court's action in refusing to dismiss the indictment against Petitioner, LEWIS MILLER SMYTH, III, because of the long and undue delay between the F.B.I. initial investigation and the return of the final indictment which resulted in the loss of evidence because of the action of the agents of the United States, thus, depriving Petitioner of a fair trial and due process under the Fifth Amendment of the Constitution of the United States of America.

Whether the Fifth Circuit erred in affirming the district court's action in admitting into evidence certain exhibits variously referred to as computer runs or printouts as summaries of other evidence prepared by the F.B.I. which were encumbered by powerfully prejudicial "conclusionary captions" such as "original false", "falsified difference" and "false money", thereby depriving Petitioner of a fair trial and due process of law under the Fifth Amendment to the United States Constitution.

Whether Petitioner, SMYTH, was substantially prejudiced and deprived of a fair trial by the closing argument of the United States Attorney to the effect that the jury's tax money was being "kicked in here" and that somebody should be held responsible.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution:

1. Amendment V to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

LEWIS MILLER SMYTH, III, Petitioner herein, was indicted on August 7, 1975, along with five others for violations of Title 18 USC § 286, and Title 18 USC § 287 and 2. He allegedly on or about July, 1968, and continuing thereafter to or about September 15, 1971, conspired to knowingly, willfully and unlawfully to defraud the United States, the United States Department of Defense and AVSCOM, by obtaining and aiding the obtainment of the payment and allowance of false, fictitious and fraudulent claims, and that said Petitioner did knowingly, willfully and unlawfully make and caused to be made and presented and caused to be presented false, fictitious and fraudulent claims to the United States Army Aviation Material Command of the United States Department of Defense, a department, a department and agency of the United States.

The indictment was in eight (8) counts, the first count charging the conspiracy and counts 2 through 8 charging the substantive crime or false, fictitious or fraudulent claims. A jury trial was had commencing on March 22, 1976, before the Honorable Leo Brewster, where the Petitioner entered a plea of not guilty as to all eight (8) counts of the indictment. The jury found Petitioner guilty on all eight (8) counts on April 1, 1976, and the Court sentenced him to five (5) years imprisonment on each count, the Court further ordered that said sentences were to run concurrently.

The evidence at trial reflects that Petitioner LEWIS MILLER SMYTH, III, was an employee and officer of N.H.A., Inc., a Texas corporation, that had two contracts in regard to technical publication with the United States Army Material Command of the United States Department of Defense. The allegations concern vouchers filed under the aforementioned contracts numbered respectively DAA-68-C-0784 (G) dated September 7, 1967, later modified to contract number DAAJ0168-D0022(3) and contract number DAAJ01-71-0081(P3L) dated September 21, 1970, (Gov. Ex's 2 and 3). The Government relied heavily upon the testimony of Jack Curtis Turner, named as an un-indicted co-conspirator in the indictment, to infer or suggest a meeting to form the alleged conspiracy.

The Government introduced into evidence numerous business records of N.H.A., Inc., these records were introduced throughout the entire trial and consisted of the contracts involved, Government Exhibits numbers 2 and 3. The time cards and labor distribution cards which were allegedly duplicated and computer runs.

At the trial Mr. Marvin Asbell employed by the Federal Bureau of Investigation as a computer systems analyst, supervisory computer systems analyst testified to certain exhibits to wit: Government Exhibits "32" and "33" and Government

Exhibits "34 through 40A", which were Government summaries and printouts of records of N.H.A., Inc., sent to the F.B.I. in Fort Worth. These summaries and printouts were introduced into evidence over trial counsel's objection. The computer summaries were divided into various divisional classifications among them were "voucher", "category" (original, false), "original data", "falsified data", "falsified difference"; trial counsel Anderson timely objected to the introduction of such evidence. Trial counsel Anderson further objected to the admission of any records belonging to N.H.A., Inc., for the purpose of preserving Petitioner's motion to dismiss the indictment which was heard on the Friday preceding the indictment with regard to the Government's failure to obtain all the records of N.H.A. As the lapse of time between the initial investigation and the final indictment, and the subsequent loss of records of N.H.A. was highly prejudicial to Petitioner SMYTH. The Court granted Petitioner a running objection on this objection.

Petitioner SMYTH along with the other co-defendants filed a motion to dismiss the indictment because of the undue delay between the time the investigation in the case at bar commenced and the return of the indictment in August of 1975, as said delay seriously prejudiced Petitioner's right to a fair trial because of the loss of evidence.

On March 19, 1976, the aforementioned motion was heard wherein testimony was taken from Ray Buras, who was employed as a consultant with N.H.A. in January of 1976, and other pertinent witnesses.

The evidence at that motion reflects that Ray Buras testified that he had told the Government that N.H.A. had computer runs which were important to audit the accounts of N.H.A. Buras also stated that N.H.A. records were important because once they received the information back from the Government, "basically our work has just begun because we had to do a

lot of verification." Buras further stated that Malon Jennings had told him that some of N.H.A.'s records were missing and that some of the computer runs had been thrown out.

Albert Lee Cochran, the Secretary and Treasurer of N.H.A., Inc., related that some of the computer runs had been thrown out and that these computer runs and records had probably been destroyed at the end of 1973 or beginning of 1974, and Mr. Bullard, Vice President of the total data division, destroyed the records while he was doing away with miscellaneous type paper and things that supposedly had no relevance whatsoever to the activities of the company, and that he'd have writers and some illustrators in the area where the records were kept and he was trying to make room.

Malon Jennings, Special Agent for the F.B.I. in Fort Worth and case agent, testified that the investigation in the case at bar commenced around early November of 1971. That he appeared before the grand jury in this cause in 1972, and that he had picked up records concerning December 18, 1967, through August 31, 1971. That these records were picked up by him in November 1972. Jennings later at trial testified he received additional time cards from N.H.A. in July of 1974. There were probably two other grand juries in 1974.

Buras also related that in running an audit it would be necessary to include all employees' time cards and labor distribution runs in determining the accuracy of all work done and all work charged and that some of these records were thrown out.

The Government's attorney in the closing argument argued to the jury that the jury's tax money was being "kicked in here" the Court sustained the objection. However, the attorney for the Government immediately asked the jury to hold somebody responsible and told them "you decide who is to be held responsible for this."

REASONS FOR GRANTING THE WRIT

ISSUE NUMBER ONE

The Fifth Circuit by affirming the case at bar has decided an important Federal Constitutional question that is in apparent conflict with principles announced by this Court in *UNITED STATES V. MARION*, 404 U.S. 307, 92 S.Ct. 455, 30 L Ed 2d 468, (1971), in that the United States Government's pre-indictment delay resulted in the loss of evidence because the agents of the United States failed to pick up and sequester pertinent records. Thus, depriving Petitioner of a fair trial and due process of law under the Fifth Amendment to the United States Constitution.

The basic question which this Court must determine is whether Petitioner was deprived of a fair trial and due process of law because of the undue delay between the Government's initial investigation commencing in November of 1971, and the final indictment in August of 1975. Petitioner filed his motion to dismiss the indictment because of the undue delay between the time the investigation began and the return of the indictment.

Ray Buras, who was a consultant with N.H.A., Inc., in January of 1976, testified that the records which are the subject of this issue were at the company's Jacksboro Facility near Fort Worth, Texas, and that he was first contacted, concerning the N.H.A. investigation, by the F.B.I. in January of 1972. The importance of the lost records cannot be overly stressed as the records kept track of labor distribution that were accumulated by job number, and the cost accumulated within a job would give management a computer printout as to the total number of hours worked and the total charges to that particular job. The computer print had a record of both

time cards, there were separate printouts for the labor distribution and separate printouts for the W-2 information. Buras further related that it was very difficult without this computer run to determine whether a particular segregated group were all the hours performed on a contract or all the people who worked on that contract.

On November 27, 1973, Special Agent Malon Jennings went to N.H.A. and took possession of some cards that were in an office occupied by Ray Buras, and received additional time cards from N.H.A. in July of 1974. Jennings had no idea what happened to the time cards that he left at N.H.A. Those cards were not available at trial. Jennings testified that he took the time cards given to him by Ray Buras, the then comptroller of N.H.A. and sent them to Washington, D.C.

The time cards that were first sent to Washington were incomplete and Jennings was depending on someone else to furnish him the records. If these records furnished him were incomplete then, whatever information he placed in the computer for analysis would also be incomplete.

In *UNITED STATES V. MARION*, supra, this Court recognized that statutes of limitations do not fully define suspects' rights to be speedily accused and the Governmental post prosecution delay may violate a defendant's right to due process under the Fifth Amendment to the United States Constitution. The standard announced in *MARION* was as follows:

> "Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. * * *

> However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution."

The Fifth Circuit Court of Appeals in *GRAVITT V. UNITED STATES*, 523 F.2d 1211 (5th Cir. 1975), recognized that although deliberate delay to prejudice the defense is weighed against the Government, this Court will consider the Government's negligent delay. Under *MARION*, supra, SMYTH's Fifth Amendment claim involves "a process of balancing the reasonableness of the delay against any resultant prejudice to the defendant." *UNITED STATES V. JACKSON*, 504 F.2d 3337, 339 8th Cir. 1974, (Cert. denied 420 U.S. 964 95 S.Ct. 1356, 43 L Ed 2d 442 1975).

First the initial investigation commenced early in November of 1971, and the indictment was returned on August 8, 1975, thus, there was more than three years and eight months between when the initial investigation began and when the indictment was returned.

It must be remembered that Petitioner SMYTH left N.H.A., Inc., early September 1970, and by doing so he had no control over the records, documents, and computer runs which were destroyed in the end of 1973 or the beginning of 1974.

Petitioner SMYTH suffered "substantial actual prejudice" as was reflected by the testimony of Don Warren, a certified public accountant. Warren testified that he examined Defendant's Exhibit number 26 which was a daily labor distribution report for the week ending 8-31-69, and that that record showed total hours worked on various jobs of N.H.A., Inc., which included the Army Jobs in question. That he then referred Defendant's Exhibit number 26 back to the F.B.I. computer printout and found that there were at least eleven (11)

employees who were listed under Army jobs that were not on the F.B.I. computer printouts, and that there were 198 hours which were not included in the Government's listing for Army Job hours worked. This resulted in 65% of unaccounted labor hours for that one week.

Hence, it can be seen that if error in one week of 65%, the additional missing records could have demonstrated that the F.B.I. computer runs were in substantial error, throughout, all to Petitioner's SMYTH's prejudice. Harm to Petitioner SMYTH was further shown in the testimony of Lou Asbell, computer systems analyst in the employment of the F.B.I., in his testimony wherein he admits that Army time shown of the Defendant's Exhibit number 26 a daily labor distribution report did not appear on the reconstructed F.B.I. computer run.

The action on the part of the Government was of such a prejudicial nature that the undue delay herein was so severe that it substantially impaired the Defendant's ability to defend himself. *UNITED STATES V. GOLDEN*, 436 F.2d 941 (1971) (8th Cir.); *UNITED STATES V. EWELL*, 383 U.S. 116 86 S.Ct. 773 15 L Ed 2d 627, (1966). For in 1972 evidence had been presented to a grand jury in regard to N.H.A., Inc., and there were probably two grand juries in 1974 where evidence was presented. And yet, no action was taken on behalf of the United States to secure the documents in question even after the F.B.I. had been informed by Ray Buras, of the importance of those documents both for Governmental use and for N.H.A., Inc. so that the F.B.I. computer runs could be verified as to correctness or that such records were necessary to prepare and accurate audit.

In the case at bar, the Government knew at the very least that in 1972 that they were going to seek prosecutions in this matter as they brought this case before a 1972 grand jury. Yet, no action was taken to pick up and sequester these pertinent

records. Such culpable action on the part of the United States Government at the very least amounts to gross negligence as there was no communication between the F.B.I. and the United States Attorney's Office as to the fact that these documents should be sequestered, rather than a piece meal investigation. In other words, such failure on behalf of both the F.B.I. and the United States Attorney's Office to conduct a proper investigation and pick up all pertinent documents was akin to a failure to let "the left hand know what the right hand is doing or had done." The fact that this Government inaction may have been "inadvertent" does not lessen its impact, as Petitioner SMYTH was effectively prevented from adequately defending himself. *SANTOBELLO V. NEW YORK*, 404 U.S. 262, 92 S.Ct. 495, 499, 30 L Ed 2d 427 (1971).

As this Court stated in *BARKER V. WINGO*, 407 U.S. 514, 531 92 S.Ct. 2182, 2192 33 L Ed 2d 101 (1972):

> "A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the Government. A more neutral reason such as negligence or over crowded courts should be weighed less heavily BUT NEVERTHELESS SHOULD BE CONSIDERED SINCE THE ULTIMATE RESPONSIBILITY FOR SUCH CIRCUMSTANCES MUST REST WITH THE GOVERNMENT RATHER THAN WITH THE DEFENDANT." (emphasis added)

Further, the Government did not meet its burden, for where there is a showing of "substantial delay" in the return of an indictment, that is, when the length of delay is of greater duration than usually attributable to the normal processes of the judicial system the Government must show that such delay did not substantially prejudice the defendants, *UNITED STATES V. STAMP*, 458 F.2d 759 (US App. D.C.).

ISSUE NUMBER TWO

By affirming the case at bar the Fifth Circuit has decided an important Federal Constitutional question that is in conflict with principles announced by this Court in *UNITED STATES V. JOHNSON*, 319 U.S. 503, 83 L Ed, 63 S.Ct. 1233, and at the very least, the lower court in the case at bar departed from a course of judicial proceedings as to deprive Petitioner of a fair trial calling for this Court to exercise its supervisory power over the federal courts.

During the course of Petitioner's trial when the Government was presenting its case in chief and when Mr. Marvin Asbell, a computer system analyst supervisory computer analyst with the F.B.I., the Court admitted into evidence certain Government exhibits, to-wit: Government Exhibits "32" and "33" and "34" through "40A". These computer runs or printouts were admitted as summaries of other evidence, as the Court so instructed the jury over trial counsel's timely objection. These computer runs or printouts were divided into various divisional classifications, "voucher", "category (original, False)", "falsified data", "falsified difference", "false money" and "false hours." It is Petitioner's contention that the labeling in these exhibits was of such a nomenclature that the conclusionary captions so inflamed the jury as to prejudice Petitioner and deprive him of a fair trial.

It is Appellant's contention that these various exhibits which were F.B.I. computer runs or printouts admitted obstentively as summaries of other evidence were inadmissible, although purporting to be accurate summations of evidence, the conclusionary captions were in fact based upon assumptions or conclusions of the persons who prepared them, as to the weight to be given such exhibits the province of the jury was invaded, and the conclusionary labels which were used indeed was so inflamatory as to constitute prejudicial error, as these exhibits

were deliberately spread before the jury.

The most extensive judicial exposition on the admissibility of charts and summaries has been developed in those cases dealing with criminal tax evasion trials. In *UNITED STATES V. JOHNSON*, supra, this Court seemed to sanction the propriety of the use of hypothetical questions propounded to an expert witness in a criminal tax evasion case, there the Court believed such a question does not invade the province of the jury as long as proper guidance by the trial left the jury free to exercise its untrammeled judgment upon the worth and weight of the testimony. However, in *HOLLAND V. UNITED STATES*, 328 U.S. 121, 99 L Ed 2d 150, 75 S.Ct. 127, decided a decade after *JOHNSON*, supra, this Court observed that "bare figures have a way of acquiring an existence of their own independent of the evidence which give use to them.", at 99 L Ed 160, and that a jury may assume that once the Government has established the figures in its computations, the crime of tax evasion automatically follows.

In the case at bar, Petitioner along with his co-defendants were indicted and tried for filing false and fictitious claims, and the labels which the Government placed upon the named exhibits were "original false", "falsified data", "falsified difference", "false money", and "false hours". These labels were highly conclusionary captions, and once the Government established the figures in its computations through their expert witness, Marvin Asbell, it was likely that the jury believed that the filing of false and fictitious claims automatically followed, thus, the admission was reversible, considering the type of charge, and the specific intent which the Government had the burden to prove beyond a reasonable doubt.

The Government's entire case was that the Petitioner and his co-defendants conspired to and did file false and fictitious claims, and by the inflamatory nomenclature and prejudicial

captions used on these various exhibits there was a complete takeover of the jury's function as to whether these were actually false and fictitious claims filed with AVSCOM. This amounted to Petitioner's conviction in a "trial by charts" as the trial court permitted the jury's unrestricted and acceptance and use of the summaries as a substitute for primary and independent proof, *LLOYD V. UNITED STATES*, 226 F.2d 9.

In *LLOYD*, the Fifth Circuit warned: at 226 F.2d 17:

> Whenever possible, such charts should be confined in their preparation to strictly mathematical computations subject to detailed explanation upon the trial by the testimony of expert Government witnesses, and they should not be encumbered by such impressive, conclusionary captions as "over-statement of merchandise purchases", "over-statement of delivery expenses", "unreported cash receipts of Lloyd's Bakery", "unreported and undeposited cash receipts invested in United States Savings Bonds", "unreported net income of Mr. E. C. Lloyd", "income tax unreported and unpaid by Mr. Lloyd", such as were used on the Government's charts here in dispute while a prosecution witness may testify as to such conclusions from his mathematical computations, we think the danger in permitting the unrestricted use of such phases upon charts results from a jury's natural tendency to accept such unsworn, conclusionary verbiage as authentic, primary proof, instead of purely in summarization and explanation of sworn testimony or authenticated documentary evidence."

It is respectfully submitted that the above quoted law should and does apply in the case at bar, that the questioned exhibits herein should have been confined to strictly mathematical computations without the use of the prejudicial and inflamatory

nomenclature and captions which was used by the Government. ment. The Court merely instructed the jury that the F.B.I. computer runs or printouts were not actual evidence, but were admitted as summaries of other evidence, and admitted only for their assistance and convenience in considering the other exhibits which they purported to summarize. However, this instruction did nothing to cure the prejudicial error which occurred.

Furthermore, Petitioner is prejudiced by the fact stated in issue one concerning the pre-indictment delay which resulted in the destruction of records which were necessary to verify the figures which were listed below the "captions" in question as Petitioner was unable to verify in his defense the accuracy of the F.B.I. reports thus, both the accuracy of the F.B.I. runs and the captions, added to the prejudicial error of the F.B.I. computer runs which were admitted into evidence.

On August 5, 1977, the Fifth Circuit Court of Appeals, corrected its opinion concerning this issue and strongly emphasized Rule 1006 of the Federal Rules of Evidence, and the Court now tells us that such summaries may be introduced in evidence even though Rule 1006 does not contain the word "evidence" and therefore a cautionary instruction was not necessary as to the fact that said instruction was not evidence. Petitioner vehemently disagrees with the court's corrected opinion.

First, as the Fifth Circuit noted, the word "evidence" is not used in Rule 1006 and the Rule goes on to state that "voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." It is Petitioner's contention that the only correct interpretation of this language is that charts, summaries, or calculations may be presented in court only as a jury aid designed to clarify voluminous

documents already in the record and to provide a manageable prospective for the Jury in its deliberations. To allow summaries and charts without the documentary evidence is clearly a trial by "charts and summaries" and denied Petitioner the right to confrontation and cross-examination. Although he may cross-examine the preparer, a chart or summary cannot be cross-examined, especially if the documentary evidence is not available.

Further, it must be realized in this case, Rule 1006 was not even complied with as due to the pre-indictment delay, supra issue one, documents which should have been used to prepare the charts were not available for inspection by the defense attorneys and clearly since all documents were not available to the preparer of the charts and summaries the charts and summaries were therefore inaccurate.

It must be remembered that it is Petitioner's contention that he was denied a fair trial due to the "conclusionary captions" of the charts and that no act of congress including the Federal Rules of Evidence can over-ride a defendant's constitutional rights to a fair trial. The Federal Rule 1006 allows only that under the proper circumstances that charts, summaries and calculations may be presented in court. However, this Rule in no way allowed the characterizations the Government utilized in the summary headings, and no cautionary instruction could possibly reduce the prejudicial affect.

ISSUE NUMBER THREE

By affirming the case at bar the Fifth Circuit has decided an important Federal Constitutional question that is in conflict with principles announced by this Court in *BERGER V. UNITED STATES*, 295 U.S. 78, 79 L Ed 1314, and at the very least, the lower court in the case at bar departed from a course of judicial proceedings as to deprive Petitioner of a fair trial calling for this Court to exercise its supervisory power over the federal courts.

During the Government's closing argument Mr. Sweeny, the Assistant United States Attorney, argued, "You want to say we approve of this type of conduct in dealing with the Government? Let Uncle Sam take the ride, but when you think about that, think of that, that's your tax money, that's your tax money that's being kicked in here." Trial counsel objected, and the Court instructed the jury not to consider the portion about their tax money. However, the United States Attorney immediately thereafter asked the jury to hold somebody responsible and told them, "You decide who is to be held responsible for this." Trial counsel objected, but was overruled by the court. It is submitted that although the court instructed the jury not to consider the portion about their tax money being kicked in, the harm was already done, and such instruction could not cure the error.

The Fifth Circuit at page 3210 states: "we view the prosecutor's pitch as an unprofessional and highly improper appeal to the passion and prejudices of the jurors", but, because of the trial court's instruction and that this was not a close case, the error was harmless. It is submitted that the Fifth Circuit was mistaken as to closeness of the evidence and the teachings of *HANFORD V. UNITED STATES*, 249 F.2d 295, and *BERGER V. UNITED STATES*, supra, be applied.

Here, the United States Attorney called upon the jury to place responsibility on SMYTH, because someone had to be fixed with that responsibility instead of finding the Petitioner guilty beyond a reasonable doubt upon the evidence, which the Government had adduced at trial. *UNITED STATES V. DAWSON*, 486 F.2d 1326, (5th Cir. 1973). And in the first part of his argument which was objected to, the United States Attorney made an improper appeal to convict Petitioner by preying upon the sympathy of the jurors as taxpayers as their money was the money which was lost. Petitioner was not charged with responsibility for the loss of any of the jurors tax monies. The United States Attorney's argument was obviously improper and reversible error for the sole effect of his summation was to inflame passion of or arouse the jury's prejudice by making them the victims of an uncharged crime instead of keeping them as impartial and open minded finders of fact.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Joseph A. Calamia per m.a.s.

JOSEPH A. CALAMIA,
Attorney for Petitioner

Charles Michael Mallin per m.a.s.

CHARLES MICHAEL MALLIN,
Attorney for Petitioner

WOODROW W. BEAN, SR.,
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, JOSEPH A. CALAMIA, one of the attorneys for the Petitioner, LEWIS MILLER SMYTH, III, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this the 19th day of August, 1977, I served three copies of the foregoing Petition for Writ of Certiorari each, on the following:

1. On Mr. John Sweeney, and Mr. Gerhard Kleinschmidt, Assistant United States Attorneys for the Northern District of Texas, by mailing them three copies of the same at their offices, Federal Courthouse Building, Fort Worth, Texas.

2. On the United States by mailing three copies thereof in a duly addressed envelope, to the Honorable Robert H. Bork, United States Solicitor General, United States Department of Justice, Washington, D.C.

Joseph A. Calamia per m.a.s.

JOSEPH A. CALAMIA

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 76-2314

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

LEWIS MILLER SMYTH, III, and GLENN B. BAVOUSETT,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas

May 18, 1977

Before GODBOLD, TJOFLAT and HILL,
Circuit Judges

TJOFLAT, Circuit Judge:

Appellants Lewis Smyth and Glenn Bavousett are former officers of Norman Harwell Associates, Inc. (NHA), a corpora-

tion engaged in the preparation and publication of technical materials. They were charged in an eight count indictment with conspiring to defraud 1/ and with defrauding 2/ the United States by overbilling the United States Army Aviation Material Command (AVSCOM) on two cost-plus contracts 3/ which NHA had with AVSCOM. The overbilling was allegedly done intentionally by appellants and other officers and employees of NHA who systematically replaced the company's original employee labor distribution cards with a set of forged cards on which time formerly billed by NHA to private clients was shown as having been spent on AVSCOM work. The appellants were tried and convicted along with other participants in the scheme and sentenced to concurrent five-year terms of imprisonment on each count.

On appeal appellants' principal arguments are (1) that the lengthy pre-indictment delay denied them due process, (2) that the lower court erred in admitting into evidence certain FBI computer printouts, and (3) that the prosecutor's closing argument was improper and denied them a fair trial. 4/ We reject each of these arguments and affirm.

1/ 18 U.S.C. § 286 (1970).

2/ Id. 287

3/ Under the contracts NHA agreed to develop, write and deliver certain technical manuals to AVSCOM at an agreed composite billing rate for each type of employee who worked on the contracts. The rate was designed to include labor, overhead and profit. Thus NHA was required to keep track of the time employees spent on AVSCOM work and then to bill AVSCOM at the composit rate for the total hours.

4/ Appellants also question the sufficiency of the evidence, the trial court's failure to grant their severance motions, the FBI's refusal to discuss the case with them, and certain jury instructions. We have examined each of these claims of error and find them to be totally without merit.

I. Pre-Indictment Delay

The indictment was returned on August 7, 1975. In Count I it charged a conspiracy running from June 28, 1968, through September 15, 1971, while Counts II through VIII charged substantive offenses based on false billings during 1970. (These false billings constituted some of the overt acts specified in the conspiracy count.) Thus, there was a period of three years and ten months between the termination of the conspiracy (the most recent offense) and the return of the indictment. Though they concede that the indictment was returned well within the five-year statute of limitations period, 5/ appellants claim that under *United States v. Marion*, 404 U.S. 307, 320-21, 92 S.Ct. 455, 463, 30 L.Ed.2d 468, 478-79 (1971), the indictment should nonetheless have been dismissed because the delay substantially prejudiced their right to a fair trial. The prejudice is said to have resulted from the accidental destruction of NHA employees of certain corporate records in 1973, including certain computer printouts, which appellants claim might have demonstrated that the AVSCOM billings were not inflated. 6/ While it is admitted that the Government did not destroy these records, appellants argue that the Government knew of the records' existence and importance and thus was negligent in failing to insure their safe keeping.

We reject this argument for two reasons. First, the law identifies two factors which must be considered in evaluating

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5/ Id. § 3282

6/ The appellants and the other officers and employees of NHA who were involved in the fraudulent billing scheme left NHA in 1971 and were thus not involved in the subsequent destruction of the records. The records were simply thrown out to provide needed working space, and the NHA employees in charge were under the impression that the records were no longer important.

a complaint of pre-indictment delay: (1) that defendant incurred substantial prejudice as a result of the government's delay, and (2) that the prosecution had intentionally employed the delay to gain a tactical advantage. *United States v. Avalos*, 541 F.2d 1100, 1107 (5th Cir. 1976). See also *United States v. Duke*, 527 F.2d 386 (5th Cir. 1976); *United States v. Butts*, 524 F.2d 975 (5th Cir. 1975). But see *Gravitt v. United States*, 523 F.2d 1211, 1216, (5th Cir. 1975) ("negligence is counted against the government but is weighted less heavily"). There has not even been an allegation here that the delay was "an intentional device to gain tactical advantage over the accused." *Marion*, 404 U.S. at 320-21, 92 S.Ct. at 463, 30 L.Ed.2d at 478-79. The record clearly shows that, while the Government investigation of NHA began in 1971, it was not until April 1975 that a witness came forward and related to investigators how the fraud was perpetrated. Prior to that time the FBI knew that NHA's records had been tampered with but did not know who the culprits were. Thus, the delay in the present case was in no way related to any Government misfeasance.7/

Second, even if the Government had been responsible for the pre-indictment delay, we believe that appellants have failed to show substantial prejudice. The fact is that, while appellants claim the missing records would have exonerated them, their proffer failed to support their contention. Indeed, the record indicates that all the pertinent records were before the court. The original set of employee time cards and the forged set were placed in evidence, as were the computer runs which tied the forged set of cards into the vouchers presented to AVSCOM.

7/ Appellants characterize the Government's conduct as negligent; however, the alleged negligence relates to the failure of investigators to seize the documents which were later destroyed. At no point did the appellants make a showing that the Government's negligence caused the pre-indictment delay.

These were the critical source materials, for they clearly demonstrated that someone copied the original cards submitted by the employees and changed them to show additional work being performed on AVSCOM contracts. They also established that AVSCOM was subsequently billed on the basis of these forged cards. Absent some explanation as to how the destroyed computer printouts could have placed an innocent light on the forged cards and the billings based on these cards, appellants' claim that they were prejudiced is speculative at best and clearly insufficient to demonstrate prejudice. See, e.g., *Butts*, 524 F.2d at 977; *United States v. McGough*, 510 F.2d 598, 604 (5th Cir. 1975).

II. The FBI Computer Printouts

At trial two sets of computer printouts prepared by the FBI were introduced into evidence by the Government. One set tabulated the information disclosed by the employee labor distribution cards - the originals and the forged cards - to show the discrepancies between them. Over each column of the first group of printouts was a heading, and the inside cover of the exhibit contained a key which explained the meaning of each heading. The key was as follows:

MEANING OF HEADINGS

LISTING HEADER	DESCRIPTION
Voucher Hours =	Billed by NHA per Voucher No Time Card Support
Worked Hours =	Original Time Taken From Time Cards

MEANING OF HEADINGS (Continued)

LISTING HEADER	DESCRIPTION
Billed Hours =	False Time Taken From Time Cards
Amount of Voucher =	Billed by NHA per Voucher No Time Card Support
AMOUNT FOR HOURS WORKED =	Original Cost Supported by Time Cards

The second set of printouts tabulated the information on the billings submitted to AVSCOM and cross-referenced this information to the original and forged employee labor distribution cards. The exhibit was designed to show as to each voucher how much time the Government was charged for in excess of the time actually spent on AVSCOM work. The printouts contained columns with the following headings: "original data," "falsified data," "falsified data summarized," and "difference between original/false."

Appellants objected to the use of the two sets of printouts on the ground that the column headings and the explanatory key constituted improper conclusions which invaded the province of the jury. The objection was overruled, and the exhibits were admitted. In charging the jury at the end of the trial, the court instructed that these computer printouts were not evidence and were only received as summaries of the labor distribution cards - original and forged - and the billings, which were in evidence. Appellants contend that this instruction failed to cure the error earlier committed in allowing the jury to be exposed to the conclusory matter appearing on the printouts.

The evidentiary use of summaries at trial is controlled by Fed. R. of Evid. Rule 1006, which provides:

> The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals or duplicates shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court. 8/

Prior to the adoption of Rule 1006 the law governing the evidentiary status of summaries and therefore their use was unsettled. Striking differences had developed within and among the circuits, no doubt causing the district courts to resort to various approaches in handling summaries at trial. In theory the scope of judicial treatment ranged from the view that summaries were not evidence, see e.g., *Conford v. United States*, 336 F.2d 285, 288 (10th Cir. 1964), to the view that they were. See e.g., *Hartford Accident and Indemnity Co. v. Collins Dietz-Morris Co.*, 80 F.2d 441 (10th Cir. 1935). Among the opinions treating summaries as evidence the more liberal school required no underlying documents to be received in evidence as a foundation for the summaries. All that was required was that the underlying documents be made available to opposing counsel for cross-examination purposes. See e.g., *In re Shelley Furniture, Inc.*, 283 F.2d 540, 543 (7th Cir. 1960). The summaries were therefore given an independent evidentiary significance and could be introduced on the strength of the preparer's foundation testimony, thereby avoiding the need to

8/ The new Federal Rules of Evidence became effective on July 1, 1975, prior to the trial of this case.

receive voluminous documentary evidence at trial. 9/ Under the most restrictive view summaries were never accorded the position of evidence. Rather, they were treated as jury aids designed to clarify voluminous documentary evidence already in the record and to provide a manageable perspective for the jury in its deliberations. Juries were not permitted to see the summaries unless every fact reflected was established by evidence in the record. See, e.g., *United States v. Moody*, 339 F.2d 161 (6th Cir. 1964); *Hoyer v. United States*, 223 F.2d 134 (8th Cir. 1955).

9/ This approach is in keeping with liberal common law treatment of summaries espoused by Professor Wigmore:

> Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed statements - as, the net balance resulting from a year's vouchers of a treasurer or a year's accounts in a bank ledger - it is obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net result. Such a practice is well established to be proper.
>
> Most courts require, as a condition, that the mass thus summarily testified to shall, if the occasion seems to require it, be placed at hand in court, or at least be made accessible to the opposing party, in order that the correctness of the evidence may be tested by inspection if desired, or that the material for cross-examination may be available . . .
> 4 Wigmore § 1230 (4th ed. 1950).

Wigmore's view was codified by Rule 1006. See Rules of Evidence, 56 F.R.D. 183, 345-46 (1972). (Advisory Committee's Note.)

One viewing the Fifth Circuit opinions cannot clearly ascertain its position regarding the status of such summaries either. This Court has sometimes followed the liberal view; on occasion it has followed the more restrictive view. *Compare Greenhill v. United States*, 298 F.2d 405 (5th Cir. 1962), and *New Amsterdam Casualty Co. v. W. D. Felder and Co.*, 214 F.2d 825 (5th Cir. 1954) with *United States v. Prevatt*, 526 F.2d 400, 404 (5th Cir. 1976), and *United States v. Diez*, 515 F.2d 892, 905-06 (5th Cir. 1975), cert. denied, 423 U.S. 1052, 96 S.Ct. 780, 46 L.Ed.2d 641 (1976). 10/

10/ Prior to the implementation of the new Federal Rule this court's application of common law principles governing the reception of summaries as evidence varied. We have, for example, referred to such summaries as either "primary proof" or "secondary proof" in approving trial court treatment of summaries as evidence. See *McDaniel v. United States*, 343 F.2d 785, 789 (5th Cir.), cert. denied, 382 U.S. 826, 86 S.Ct. 59, 15 L.Ed.2d 71 (1965); *Azcona v. United States*, 257 F.2d 462 (5th Cir. 1958). At times we have required that the underlying source documents be in evidence before the summaries could properly be received. *McDaniel, supra*. We have also predicated admissibility on a mere showing that such underlying sources were made available for inspection by the opposing side. *Cooper v. United States*, 91 F.2d 195 (5th Cir. 1937); *New Amsterdam Cas. Co. v. W. D. Feldon & Co.*, 214 F.2d 825 (5th Cir. 1954). These variations in the treatment of summaries are manifested by the inconsistent references to them as either "competent evidence", *Ward v. United States*, 356 F.2d 938 (5th Cir. 1966); *Barrick v. Pratt*, 32 F.2d 732 (5th Cir. 1929), or useful tools through which a jury can more readily comprehend the underlying evidence. *United States v. Diez*, 515 F.2d 892, 905-06 (5th Cir. 1975), cert. denied, 423 U.S. 1052, 96 S.Ct. 780, 46 L.Ed.2d 641 (1976); *United States v. Lawhon*, 499 F.2d 352, 357 (5th Cir. 1974), cert. denied, 419 U.S. 1121, 95 S.Ct. 804, 42 L.Ed.2d 820 (1975). Through this disaccord we recently held that such summaries may be used only where the jury is instructed that the summaries themselves are not evidence. See *United States v. Prevatt*, 526 F.2d 400, 404 (5th Cir. 1976); *Diez, supra; Lawhon, supra*, but see *EAC Credit Corp. v. King*, 507 F.2d 1232 (5th Cir. 1975).

Prior uncertainties regarding the status of summaries are now resolved by Rule 1006. Although the word "evidence" does not appear in its text we construe the rule as treating summaries as evidence under circumstances where, in the court's discretion, examination of the underlying documents in a trial setting cannot be done conveniently. This construction is compelled by the rule's history and by the fact that the rule requires only the availability of the underlying documents.

That the court below did not apply the rule so as to receive the summaries in evidence is understandable in light of the conflicting case law. We are convinced, however, that under any application of Rule 1006 the use of these summaries at trial was not error. In applying the rule the trial court followed the most restrictive approach indicated in our prior opinions. This approach, from the appellant's perspective, was calculated to be the least prejudicial. The court could have excluded all of the underlying documents and received the summaries as evidence. The court chose, however, to admit these documents in evidence and to instruct the jury that the summaries were not evidence. 11/ Moreover, in light of appellants' objections to the characterizations the Government utilized in the summary headings the cautionary instruction given by the trial judge was entirely appropriate, if not necessary, for it neutralized their possible prejudicial effect. Thus, whether or not the trial court had received the summaries as evidence under Rule 1006, the cautionary instruction insofar as it emphasized that the characterizations were not evidence, would have made the

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11/ Implicit in Rule 1006 is the notion that a trial judge may choose this alternative. In the circumstances of a given case the court may feel that the jury, or the court, itself, in a bench trial, ought to consider the source documents in resolving a fact issue and that, on balance, a summarization of such evidence would add to or detract from the proper weight or emphasis to be given it.

remainder of the summaries admissible under the rule. 12/

In fine, we reject appellant's claim that the district court's treatment of the summaries unduly prejudiced their trial. In permitting the jury to utilize them, the court proceeded well within the discretion accorded it under Rule 1006. The original and forged employee labor distribution cards were in evidence. The computer printouts merely tabulated the information they disclosed. As for the headings, they accurately explained the significance the Government attached to the tabulations. In this sense the headings reflected certain assumptions, but these assumptions were amply supported by the evidence already before the jury. By instructing the jury that the summaries were not evidence, however, the trial judge took one further step to insure that the jury would not rely on the conclusory matter as independent proof of the appellants' guilt.

12/ We do not opine on the extent of error that would have been created had these summaries and characterizations been received as evidence without any cautionary instruction being given. It would seem, though, that because summaries are elevated under Rule 1006 to the position of evidence care must be taken to omit argumentative matter in their preparation lest the jury believe that such matter is itself evidence of the assertion it makes. See *Ping v. United States*, 407 F.2d 157, 160 (8th Cir.) cert. denied, 395 U.S. 926, 89 S.Ct. 1784, 23 L.Ed.2d 244 (1969); *Lloyd v. United States*, 226 F.2d 9, 17 (5th Cir. 1955). We think that the framers of the rule clearly contemplated a pre-trial resolution of any issues that may be raised concerning the use of summaries. By requiring that the underlying documents be made available to opposing counsel, the rule encourages counsel to eliminate objectionable matter and to stipulate to the form of the summary. Through this process the frequency of objections such as those raised here should be greatly reduced.

III. The Prosecutor's Closing Argument

During his closing argument the prosecutor said: "You want to say we approve of this type of conduct in dealing with the Government? Let Uncle Sam take the ride, but when you think about that, think of that, that's your tax money, that's your tax money being kicked in here." Appellants submit that this argument was an improper attempt to appeal to the personal prejudices of the jurors as taxpayers and that it was so prejudicial they were denied a fair trial.

We view the prosecutor's pitch as an unprofessional and highly improper appeal to the passion and prejudices of the juror. *See Handford v. United States*, 249 F.2d 295 (5th Cir. 1957); ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function § 5.8(c) (1972). But we must consider errors of this sort in the context of the entire record to determine whether or not the substantial rights of an accused were affected. *See Handford, supra;* Fed. R. Crim. P. 52(a). In the present case, the court sustained the objection and gave an appropriate cautionary instruction.[13/] More importantly, though, unlike the situation in *Handford*, this clearly was not a close case. The evidence against appellants was strong, and we are therefore convinced that the error was harmless.

AFFIRMED.

13/ The court instructed the jury as follows:

> Members of the jury, you are not to consider that statement for the reason that it's a personal appeal to you. It's alright for him to argue that tax money is paying for it but [not] the portion about your tax money hurting you. It will not be considered by you because you're not supposed - you're supposed to view the matter impartially. Record at 1107-08.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

May 18, 1977

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 76-2314 - U.S.A. VS. SMYTH, ET AL.

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, F.R.A.P., govern costs, petitions for rehearing and mandates, respectively. *A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the petition in the mail on the 14th day will not suffice.*

Local Rule 15 provides that "A motion for a stay of the issuance of a mandate in a *direct criminal appeal* filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly

demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to Local Rule 7 which provides: "Appointed counsel shall, in the event of affirmance or other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Ann Barre
Deputy Clerk

enc.
cc: Mr. Jim Launch
✓Mr. Charles Michael Mallin
Mr. Joseph A. Calamia
Mr. Woodrow Bean, Sr.
Mr. Gerhard E. Kleinschmidt
Mr. John W. Sweeney, Jr.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

July 20, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-2314 - U.S.A. v. LEWIS MILLER SMYTH, III and GLENN B. BAVOUSETT

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Brenda M. Hauck
Deputy Clerk

cc: Mr. Jim Claunch
Messrs. Charles Michael Mallin
Joseph A. Calamia
Mr. Woodrow Bean, Sr.
Messrs. Gerhard E. Kleinschmidt
Mr. John W. Sweeney, Jr.

APPENDIX "D"

§ 286. Conspiracy to defraud the Government with respect to claims

Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
June 25, 1948, c. 645, 62 Stat. 698.

§ 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
June 25, 1948, c. 645, 62 Stat. 698.